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No. 79-2016

In the Supreme Court of the United States

OCTOBER TERM, 1980

IN RE SEBASTIAN INTERSIMONE, PETITIONER

ON MOTION FOR LEAVE TO FILE AND PETITION FOR A WRIT OF MANDAMUS AND/OR PROHIBITION

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner requests that this Court issue a writ of mandamus to require that his counsel be permitted to represent him *pro hac vice* in connection with his filing of a motion for a new trial in the United States District Court for the Southern District of New York.

1. In November 1976, petitioner was convicted on a number of counts of a narcotics conspiracy indictment. He was sentenced to concurrent terms of 15 years' imprisonment, a $25,000 fine, and a three-year term of special parole on each count. This conviction was summarily affirmed by the court of appeals. 573 F. 2d 1298 (2d Cir. 1978).

On June 22, 1979, petitioner was convicted of contempt of court for contacting various jurors from his trial in

contravention of an order of the district court. The court sentenced him to an additional four months' imprisonment on that conviction. Again, the court of appeals summarily affirmed. 622 F. 2d 576 (2d Cir. 1980).

Petitioner then filed a motion for a new trial, in which he was for the first time represented by his present attorney, James G. Kolb, of Rockville, Maryland. After filing the new trial motion on petitioner's behalf, attorney Kolb filed a paper he styled a "Motion and Affidavit," in which he requested that he be permitted to appear *pro hac vice* as petitioner's counsel (Pet. App. 1-2). The district court, in a memorandum endorsement, denied the motion (Pet. App. 2). Kolb then wrote a letter to the court again requesting that he be permitted to represent petitioner (Pet. App. 3-4). The district court, treating the letter "as an application for reargument," denied the request (Pet. App. 4).

2. Kolb then filed a petition "for writs of mandamus and prohibition" in the court of appeals, seeking to force the district court to permit him to represent petitioner in connection with his new trial motion (Pet. App. 5-7). The court of appeals denied the petition without opinion (Pet. App. 8).

3. Petitioner asserts, without supporting argument or citation of authority (Pet. 6), that the district court's action was arbitrary and capricious and an abuse of discretion. Petitioner further contends, again without citation of authority, that the district court's action is contrary to its "mandatory duty under the Sixth Amendment to the Constitution of the United States to permit petitioner to be represented by counsel of his choice" (Pet. 6-7).

Petitioner is incorrect in suggesting that he has an absolute right under the Sixth Amendment to be represented by attorney Kolb. The Sixth Amendment guarantees a defendant the effective assistance of counsel in criminal cases, but it does not require that a court ensure that the defendant be given the particular lawyer he chooses, even at trial. See *United States ex rel. Carey* v. *Rundle*, 409 F. 2d 1210, 1215 (3d Cir. 1969), cert. denied, 397 U.S. 946 (1970); see also *United States* v. *Dardi*, 330 F. 2d 316, 335 (2d Cir.), cert. denied, 379 U.S. 845 (1964); *Maynard* v. *Meachum*, 545 F. 2d 273, 278 (1st Cir. 1976). Moreover, the Sixth Amendment has no role to play whatever in the present case, since the Sixth Amendment does not apply to post-conviction proceedings such as a motion for a new trial. See *United States* v. *Lee*, 513 F. 2d 423, 424 (D.C. Cir.), cert. denied, 423 U.S. 916 (1975); *Dirring* v. *United States*, 353 F. 2d 519, 520 (1st Cir. 1965); see also *Vandenades* v. *United States*, 523 F. 2d 1220 (5th Cir. 1975); *United States ex rel. Curtis* v. *Illinois*, 521 F. 2d 717, 719 (7th Cir.), cert. denied, 423 U.S. 1023 (1975); *Day* v. *United States*, 428 F. 2d 1193, 1195 (8th Cir. 1970); *Stanley* v. *Wainwright*, 406 F. 2d 8, 10 (5th Cir. 1969). Nor does a lawyer have an absolute right to appear *pro hac vice* in representing a client. *Leis* v. *Flynt*, 439 U.S. 438 (1979).

Moreover, petitioner's attorney has not satisfied the requirements of Local Rules 3(c) and 4(a) of the United States District Court for the Southern District of New York regarding *pro hac vice* applications. Rule 3(c) provides that an attorney from another state may be permitted "to argue or try a particular cause." However, it further provides that only an attorney who is a member of the bar of the district court "may enter appearances for parties, sign stipulations or receive payments upon

judgments, decrees or orders." Rule 4(a) requires that an attorney who appears as attorney of record in the district court must either have an office in the Southern or Eastern District of New York or retain as local counsel an attorney who has an office in one of those districts. Because petitioner's counsel is not a member of the bar of the district court and has not designated a member of the bar as local counsel, the district court's action cannot be characterized as arbitrary, capricious, or unreasonable.

Finally, at least at the present juncture, the district court's ruling is not prejudicial to petitioner. The motion for a new trial has already been filed and is pending before the district court. Unless the district court determines that a hearing should be held on that motion, attorney Kolb will not need to make any further appearances in district court on petitioner's behalf. Accordingly, there is no basis for granting relief at this time, particularly by means of a writ of mandamus, the relief that petitioner has requested from this Court.

It is therefore respectfully submitted that the petition for a writ of mandamus should be denied.

WADE H. MCCREE, JR.
Solicitor General

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